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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO: 84-987

JACK R. DUCKWORTH, WARDEN
AND INDIANA ATTORNEY GENERAL

PETITIONERS

VS

BERNARD WILLIAMS A/K/A/
ANTHONY SHERRARD

RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT OF THE CASE

Respondent accepts the State's Statement of the case as reported in Sections A & B in the Petition for Writ of Certiorari, but takes exception to the "FACTS MATERIAL TO THE QUESTION " as presented in Section C.

In Section C, the State gives the impression that the Trial Judge Busse, affirmed the fact that the convictions were "complete" but that was not the case. A reading of the record will show that all the Trial Judge did was to affirm that his signature appeared on the documents. He could not even remember the Defendant, Respondent herein, and gave no testimony as to whether the Defendant Williams had been sentenced on the charge.

Also, on Page 9, the State claims: The trouble, inferrentially, included the forgery and 1975 theft convictions. That is a self-serving statement and is NOT clear from the record. Two Indiana Supreme Court justices made it clear that it was not permissible to infer that this statement "I have been in trouble before," could refer to the missing sentencing. It is easily possible that Williams had had unrelated problems and was not sentenced; a requirement if the habitual status is to remain.

Section C, of the Statement of Facts is not correct and should not be accepted by this Court without a reading of the record of the trial involved.

SUMMARY OF THE ARGUMENT

This case revolves around the simple question. Did the State of Indiana, by its Prosecutor, prove beyond a reasonable doubt, that Bernard Williams was twice convicted and twice sentenced for two prior unreleated felonies ? If the records would show that, then Williams would be eligible for the habitual offender status under Indiana law; however, it is the contention of two Indiana Supreme Court Justices, and the entire Seventh Circuit Court of Appeals that the State of Indiana did not prove this fact.

The facts, as rel ated by the record clearly show that the state failed to prove that Williams was twice sentenced. Thus, his habitual offender status cannot stand.

The Petitioners, seeking review of the decision of the U.S. Court of Appeals for the Seventh Circuit, state that the federal court has differed with the Indiana Supreme Court and that they have violated the doctrine of comity. That is NOT the case. The Court was most careful to show that the Indiana Supreme Court did not address the issue; the District Court relied on SUMNER VS MATA and did not address the issue; but the Seventh Circuit did decide that under the standards of JACKSON VS VIRGINIA , and under the decisions of the Indiana Supreme Court, the State Prosecutor failed to meet the requirements of the law and the habitual offender status must be removed, unless the State elected to retry Williams within 90 days. The State has not elected to retry Williams and there is no question for this Court to review.

Respondent feels that this Court should deny certiorari to the Petitioners.

ARGUMENT

INDIANA CODE 35-50-2-8 (BURNS 1979) PROVIDES FOR ENHANCED SENTENCES FOR THOSE FOUND TO BE HABITUAL OFFENDERS, AND HABITUAL OFFENDERS ARE THEREIN DEFINED IN TERMS OF PRIOR CONVICTIONS AND SENTENCES. (SEE APPENDIX 1).

IN MILLER VS STATE (1981) IND 417 N.E.2ND 339, 342, THE SUPREME COURT OF INDIANA HELD:

> "IT IS CLEAR FROM THE STATUTE THAT TO SUSTAIN A SENTENCE UNDER IT, THE STATE MUST SHOW THAT THE DEFENDANT HAS BEEN PREVIOUSLY TWICE CONVICTED AND TWICE SENTENCED FOR FELONIES, THAT THE COMISSION OF THE SECOND OFFENSE WAS SUBSEQUENT TO HIS HAVING BEEN SENTENCED UPON THE FIRST AND THAT THE COMISSION OF THE PRINCIPLE OFFENSE UPON WHICH THE ENHANCED PUNISHMENT IS BEING SOUGHT WAS SUBSEQUENT TO HIS HAVING BEEN SENTENCED UPON THE SECOND CONVICTION."
> (EMPHASIS ADDED IN ORIGINAL)

IN THE CASE AT BAR, THE STATE UNDERTOOK TO PROVE THAT THE DEFENDANT, BERNARD WILLIAMS, HAD BEEN CONVICTED AND SENTENCED FOR FORGERY IN 1971 AND FOR THEFT IN 1975. IT INTRODUCED INTO EVIDENCE CERTIFIED COPIES OF THE ORDER BOOK ENTRIES IN SUCH CASES, EVIDENCE FINDINGS UPON GUILTY PLEAS AS TO BOTH PRIOR OFFENSES. TRANSCRIPTS OF THE SENTENCING, HOWEVER, WERE NOT INTRODUCED.

BY THE TESTIMONY OF THE LAWYERS WHO HAD REPRESENTED THE DEFENDANT IN THOSE PRIOR PROCEEDINGS, THE STATE ESTABLISHED THAT THE DEFENDANT AND RESPONDENT HEREIN WERE ONE AND THE SAME. THE STATE ALSO ESTABLISHED, BY THE TESTIMONY OF ONE OF THE LAWYERS THAT DEFENDANT HAD BEEN SENTENCED UPON THE FORGERY CONVICTION BUT DID NOT PRESENT ANY EVIDENCE THAT HE HAD BEEN SENTENCED UPON THE THEFT CONVICTION.

THE TRIAL COURT'S ORDER IN LIMINE WAS ADDRESSED TO THE DEFENDANT AND DID NOT RESTRICT THE STATE IN REPRESENTING EVIDENCE OF SENTENCING. THE RECORD, HOWEVER, IS DEVOID OF EVIDENCE THAT THE DEFENDANT WILLIAMS HAD EVER BEEN SENTENCED UPON THE THEFT CONVICTION. ONE COULD INFER THAT HE HAD BEEN SENTENCED FOR SOME OFFENSE FROM HIS OWN ADMISSION THAT HE HAD "SERVED TIME". HOWEVER, THERE IS NO DISCLOSURE WITH RESPECT TO THE CONVICTION UNDER WHICH

Under the statute, the State must show a sentencing for each of the alledged prior convictions. The State however, made no attempt to prove the sentencing circumstantially, for example, by showing that the defendant "served time" for two alledged prior felonies and had not "served time" for any convictions other than those charged. For all that can be disconcerned from the record defendant may have served time for unreleated misdemeanors. A reasonable trier of fact may not infer, beyond a reasonable doubt, I.C. 35-50-2-8 (b), that a defendant had been sentenced for a specifically alledged prior felony conviction from a naked admission that he had been in jail.

Copies of docket sheets were identified as exhibits and were commented upon by some of the witnesses. They were never introduced into evidence and are not part of the record. Further, none of the testimony reveals what the docket sheets evidenced, other than that they did relate to the aforementioned forgery and theft convictions. That the judgements of convictions were identified as final, by Judge Busse, the Judge who had presided at the guilty plea hearings is of no consequence. He merely identified his signatures upon docket sheets. He also acknowledged that he did not know whether the defendant was the same person who had suffered the convictons shown by such docket sheets. His testimony cannot be regarded as evidence against the defendant.

Upon this state of the record, the finding that Williams was a habitual offender cannot stand. The finding results in the denial of the defendants freedom. The quality of proof to sustain such findings is fixed by statute and is the same as that required to sustain a guilty verdict upon a crime charged, "<u>beyond a reasonable doubt</u>" . The State simply failed to prove one of the required elements.

In a dissenting opinion, two Justices of the Indiana Supreme Court of Indiana, Justice J. Prentice and Justice DeBruler stated:

> "RATHER, THE RECORD IS DEVOID OF ANY EVIDENCE FROM WHICH IT CAN BE FOUND OR REASONABLY INFERED THAT THE DEFENDANT HAS EVER BEEN SENTENCED UPON THE PRIOR THEFT CONVICTION. IT IS NOT THE OFFICE OF THIS COURT TO PATCH THE HOLES SOMETIMES LEFT BY INEXPERIENCED OR CARELESS COUNSEL. BY DOING SO , WE MAY BE SUPPLYING AN ESSENTIAL THREAD, WHICH, IN FACT, WAS NON EXISTANT. THE FINDING, THEREFORE, IS CONTRARY TO LAW AND A DENIAL OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW. THE CASE SHOULD BE REMANDED AND THE DEFENDANT RESENTENCED." WILLIAMS VS STATE (1981) Ind., 424 N.E. 2ND 1017.

THE UNITED STATES SUPREME COURT HELD IN JACKSON VS VIRGINIA (1979) 443 U.S. 307 THAT:

> "WE HOLD THAT IN A CHALLENGE TO A STATE CRIMINAL CONVICTION BROUGHT UNDER 28 U.S.C. 2254, IF THE SETTLED PROCEDURAL REQUISITES FOR SUCH A CLAIM HAVE OTHERWISE BEEN SATISFIED --- THE APPLICANT IS ENTITLED TO HABEAS CORPUS RELIEF, IF IT IS FOUND THAT UPON THE RECORD THE EVIDENCE ADDUCED AT TRIAL HAD NO RATIONAL TRIER OF FACT COULD HAVE FOUND PROOF OF GUILT BEYOND A REASONABLE DOUBT."

WILLIAMS FEELS THAT THE STATE OF INDIANA HAS FAILED TO PROVE, BEYOND A REASONABLE DOUBT THAT HE WAS EVER SENTENCED ON THE THEFT CONVICTION, THE RECORD IS DEVOID OF ANY EVIDENCE THAT HE WAS SENTENCED; THUS, THE STATE FAILED TO MEET ITS BURDEN OF PROOF. IN ACCORDANCE WITH THE UNITED STATES SUPREME COURT'S STANDARDS AS SET OUT IN JACKSON VS VIRGINIA, SUPRA, THE DISTRICT COURT SHOULD HAVE GRANTED THE WRIT OF HABEAS CORPUS.

IN HIS MEMORANDUM AND ORDER(APPENDIX 2 THRU 8) JUDGE ALLEN SHARP STATES :

> " PARAGRAPH (B)[1] OF THE ABOVE CITED STATUTE IS THE KEY : " A PERSON IS A HABITUAL OFFENDER IF THE JURY ... FINDS THAT THE STATE HAS PROVEN BEYOND A REASONABLE DOUBT THE PERSON HAS ACCUMUPATED TWO PRIOR UNRELEATED FELONY CONVICTIONS."

HOWEVER, THE DISTRICT COURT JUDGE SHARP, FAILED TO CONSIDER PARAGRAPH (B) OF THE SAME STATUTE. IT READS :

> " AFTER HE HAS BEEN CONVICTED AND SENTENCED FOR A FELONY COMMITTED AFTER SENTENCEBB FOR A PRIOR UNRELEATED FELONY CONVICTION, A PERSON HAS ACCUMULATED TWO (2) PRIOR UNRELEATED FELONY CONVICTIONS..."
> (EMPHASIS ADDED)

THE DISTRICT COURT FURTHER STATES ON PAGE 6 (APPENDIX PAGE 7) :

> " IN LIGHT OF PETITIONER'S ADMISSION TO HAVING BEEN CONVICTED TWICE EARLIER (R 280-281) AND HIS STATEMENT THAT 'I HAVE SERVED TIME', (R276) COUPLED WITH THE OTHER EVIDENCE PRODUCED AT THE HEARING AND NOTED ABOVE THIS COURT DECLINES TO HOLD THAT THIS PETITIONER HAS OVERCOME HIS BURDEN OF PERSUASION AS SET FORTH IN JACKSON VS VIRGINIA AND SUMMER VS MATA, SUPRA,.

THESE STATEMENTS SHOW THAT THE DISTRICT COURT WAS RELYING ON THE UNVERFIED ASSUMPTION THAT THE APPELLANT WILLIAMS HAD BEEN TWICE CONVICTED AND TWICE SENTENCED , A FACT THAT THE RECORD WILL NOT BEAR OUT.

THE INDIANA SUPREME COURT, IN ITS DECISION STATED:

> " EVEN THOUGH THERE WAS NO DIRECT EVIDENCE PRESENTED REGARDING THE SENTENCING OF THE APPELLANT ON THE THEFT CONVICTION, THERE WAS AMPLE EVIDENCE..." (APP 11)

THE JUSTICES AFFIRMED THE CONVICTION BY DENYING WILLIAMS DUE PROCESS. THEY ADMIT THAT THE RECORD IS DEVOID OF EVIDENCE THAT HE WAS SENTENCED BOR THE THEFT CONVICTION.

WHILE THE STATE COURT FINDINGS OF FACT ARE CONCLUSIVE ON THE FEDERAL COURTS, UNITED STATES EX REL ORTIZ VS SIELAFF 404 FED SUPP 268 (N.D.ILL 1975), AFFD 539 FED 2ND 715 (7TH CIR 1976) 542 FED 2ND 377 (7TH CIR 1976), THE FEDERAL COURT IS OBLIGATED TO INDEPENDENTLY CONDUCT AN INQUIRY WITH RESPECT TO THE APPLICATION OF FEDERAL STANDARDS FOUND IN STATE COURT HEARINGS, STATE CONCLUSIONS OF LAW MAY NOT BE GIVEN BINDING WEIGHT. UNITED STATES EX REL STACEY VS PATE 324 FED 2ND 934 (7TH CIR 1963), CERT DENIED 377 U.S. 937, 84 S. CT. 1341, UNITED STATES EX REL WILSON VS WARDEN CANNON ETC. 538 FED 2ND 1272 (7TH CIR 1976).

THE INDIANA SUPREME COURT SET THE STANDARDS IN MILLER VS STATE IN ORDER TO DETERMINE WHETHER A PERSON IS ELIGIBLE FOR THE HABITUAL OFFENDER ENHABCEMENT OF HIS SENTENCE.

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1. SEE APPENDIX PAGE 1

THE STATUTE IS CLEAR THAT THE PERSON MUST BE CONVICTED AND SENTENCED FOR A FELONY COMMITTED AFTER SENTENCING FOR A PRIOR FELONY CONVICTION. THEN AND ONLY THEN HAS HE ACCUMULATED TWO PRIOR UNRELIATED FELONY CONVICTIONS, FOR THE PURPOSE OF THE STATUTE.

IN THE CASE AT BAR, THE SUPREME COURT OF INDIANA DISCUSSED SEVERAL OUTSIDE POINTS ABOUT PARDONS, BUT REFUSED TO ADDRESS THE ISSUE EXCEPT TO ADMIT THAT THE RECORD DOES NOT SUBSTANTIATE THAT WILLIAMS HAD BEEN SENTENCED FOR THE THEFT CONVICTION.

OBVSOUSLY TWO JUSTICES OF THE INDIANA SUPREME COURT SAW THIS AND REFUSED TO AGREE WITH THE CONVICTION. THEY RECOGNIZED THAT DUE PROCESS DEMANDS THAT A PERSON'S LIBERTY MAY NOT BE DEPRIVED WITHOUT PROOF, BEYOND A REASONABLE DOUBT. THE RECORD DOES NOT OFFER SUCH PROOF, BUT ASKS THIS COURT TO ASSUME AND INFER SUCH PROOF.

THE DISTRICT COURT RELIED ON PARAGRAPH (D) OF THE INDIANA HABITUAL STATUTE WITHOUT QUALIFYING THE PARAGRAPH AS IS REQUIRED BY PARAGRAPH (B) .

THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOUND THAT THERE WAS NOT ANY EVIDENCE OF WILLIAMS BEING SENTENCED IN THE RECORD, AND REJECTED THE STATES ARGUMENT; IN FACT, THE SAME ARGUMENT PRESENTED TO THIS COURT, THAT THE COURT SHOULD ABONDON THE STANDARD OF JACKSON VS VIRGINIA AND ALLOW A CONVICTION TO STAND IF ONE COULD INFER EVIDENCE OF A CONVICTION. THE STATE SEEMS TO THINK THAT THERE ARE TWO SERIOUS FLAWS IN THE 7TH CIRCUIT PANEL DECISION ON THIS APPEAL. THEY CLAIM THAT THE 7TH CIRCUIT HAS INTERPERTED INDIANA LAW AND THUS HAS OFFENDED THE DOCTRINE OF COMITY.

THE MAJORITY OF THE PANEL FOUND AND CLEARLY ADDRESSED THIS ISSUE ON PAGE 10-11 OF THE SLIP OPINION. THEY STATED:

> " THE INDIANA SUPREME COURT DID NOT INERPERT THE STATUTE, BUT FOUND THAT THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE JURY'S FINDING. THE INDIANA SUPREME COURT DID NOT SQUARELY ADDRESS THE ISSUE OF WHETHER ANY EVIDENCE OF SENTENCING WAS REQUIRED: IT MERELY STATED THE EVIDENCE WAS SUFFICIENT. WE ARE NOT BOUND BY THAT DETERMINATION. WE FIND THAT THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT PETITIONER WAS TWICE CONVICTED AND SENTENCED. THE FINDING THAT HE WAS AN HABITUAL OFFENDER MUST THEREFORE BE SET ASIDE."

THE ENTIRE REQUEST FOR CERTIORARI IS BASED ON THE FACT THAT THE STATE CONTENDS THAT THE MAJORITY PANEL OF THE 7TH CIRCUIT DID, IN FACT, INTERPRET THE INDIANA STATE LAWS. THIS IS JUST NOT THE CASE. THE DISSENTING PANEL MEMBER, HONORABLE JUDGE PELL, STATES ON PAGE 12 OF THE SLIP OPINION : (APPENDIX PAGE 12 LL2-3)

" ...THE INDIANA SUPREME COURT MAY NOT HABE BEEN DIRECTLY INTERPRETING ITS OWN STATUTE..."

EVEN THE DISSENTING JUSTICE COULD SEE THAT THE QUESTION BEFORE THE PANEL WAS THE SUFFICIENCY OF THE EVIDENCE.

THE STATE MAKES MUCH OF MARKINS VS WYRICK, 589 FED 2ND 387 (8TH CIRCUIT 1979), BUT THIS CASE DEALS WITH THE COURT INTERPRETING A STATE STATUTE, A SITUATION THAT IS NOT THE CASE HERE. HERE WE ARE DEALING WITH A QUESTION OF THE SUFFICIENCY OF THE EVIDENCE.

FROM THE INCEPTION OF THIS CASE, AND PRIOR TO THE CASE BEING APPEALED TO THE 7TH CIRCUIT AND FINALLY TO THIS COURT, THE QUESTION HAS BEEN WHETHER, (1) DOES THE INDIANA STATUTE REQUIRE THAT A DEFENDANT BE TWICE CONVICTED AND TWICE SENTENCED IN ORDER TO MAINTAIN THE HABITUAL OFFENDER DETERMINATION, WHICH INCLUDES A THIRTY YEAR ENHANCEMENT OF A PRISONERS SENTENCE, A DETERMINATION THAT IS NON DISCRETIONARY WITH THE TRIAL JUDGE, AND AN ENHANCEMENT, UNDER INDIANA LAW, WHICH MANDATES SERVICE OF A FULL FIFTEEN YEARS IMPRISONMENT IN ADDITION TO THE IMPRISONMENT FOR THE UNDERLYING CHARGE? THERE IS NO PAROLE OR CLEMENCY IN INDIANA UNDER THE 1977 CODE, ALTHOUGH IT APPEARS ON THE BOOKS AS A POSSIBILITY, IT IS RARELY, IF EVER, GRANTED.

THE RECORD IS DEVOID OF THIS RESPONDENT HAVING BEEN SENTENCED ON HIS SECOND CONVICTION. TWO JUSTICES OF THE INDIANA SUPREME COURT DISSENTED WITH THE MAJORITY OPINION IN WILLIAMS VS STATE 424 N.E. 2ND 1017, (IND 1981) (SEE APPENDIX 9,10,11) AND HELD THAT THERE WAS NOT ANY EVIDENCE OF THE SECOND SENTENCING. THE MAJORITY OF THE 7TH CIRCUIT PANEL AGREED WITH THEM AND ALSO HELD THAT THE RECORD IS DEVOID OF PROOF OF A SECOND SENTENCING.

THUS, UNDER INDIANA LAW, THIS DETERMINATION OF HABITUAL CRIMINALITY CANNOT STAND.

THE STATE WOULD ASK THIS COURT, AND THIS IS THE HEART OF THEIR ENTIRE ARGUMENT TO DISREGARD THE LONG ESTABLISHED PRINCIPLE OF LAW THAT PROOF BEYOND A REASONABLE DOUBT IS REQUIRED BEFORE A PERSON CAN BE CONVICTED OF A CRIME. THEY WOULD HAVE THIS COURT ABONDON THIS PRINCIPLE AND ONLY REQUIRE "PROOF "BY INFERENCE"; CERTAINLY A STANDARD THAT THIS COURT WOULD NOT ACCEPT.

ON PAGE 10 OF THE STATES PETITION TO THE 7TH CIRCUIT FOR REHEARING, THE STATE ON LINE 21 CLAIMS,

> " SENTENCING ON THE 1975 THEFT CONVICTION WAS PROVED, AT LEAST, BY INFERENCE...."

JUDGE PELL, IN HIS DISSENTING OPINION, PAGE 14, (APPENDIX 25):

> " A CAREFUL READING OF HIS TESTIMONY SEEMS TO ME TO PROVE A FULL SUPPORT FOR A REASONABLE INFERENCE THAT ...."

NEITHER OF THESE POSITIONS ARE CONSISTENT WITH THE LONG ESTABLISHED PRINCIPLE OF LAW THAT "PROOF BEYONY A REASONABLE DOUBT IS REQUIRED TO SUSTAIN AND MAINTAIN A CONVICTION. THE MAJORITY OF THE 7TH CIRCUIT STATED: " WE APPLY THE JACKSON VS VIRGINIA STANDARD TO THIS SENTENCING ISSUE BECAUSE THE STATE REQUIRES THAT AN HABITUAL OFFENDER FINDING MUST BE SUPPORTED BY PROOF BEYOND A REASONABLE DOUBT." SEE: FRENCH VS ESTELLE, 692 FED 2ND AT 1024 NO. THE INDIANA SUPREME COURT APPLIES A STANDARD SIMILAR TO THE ONE ENUNCIATED IN JACKSON VS VIRGINIA TO ITS OWN REVIEW OF THE RECORD IN A HABITUAL OFFENDER PROCEEDING. SEE: THOMAN VS STATE 431 N.E. 2ND 776 (IND 1982)."

THE STATE IS ASKING THIS COURT TO CHANGE THE JACKSON VS VIRGINIA CRITERIA FOR PROOF FOR THE HABITUAL OFFENDER DETERMINATION. YET, THE SENTENCE FOR THIS DETERMINATION FAR EXCEEDS THE PENALTY IMPOSED FOR MORE SERIOUS CRIMES. MURDER WITH MITIGATING CIRCUMSTANCES CARRIES THIRTY YEARS IN INDIANA. WWOULD THE STATE ASK THIS COURT TO CHANGE THE CRITERIA FOR MURDER ? HARDLY, YET THEY THINK A LESSER STANDARD "PROOF BY INFERENCE" SHOULD BE SUFFICIENT FOR A THIRTY YEAR SENTENCE IN THIS CASE.

THE MAJORITY OF THE 7TH CIRCUIT FOUND: (SEE APPENDIX 20,§10)

" WE CONCLUDE THAT NO RATIONAL TRIER OF FACT COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT PETITIONER WAS SENTENCED ON THE 1975 THEFT CONVICTION. THE EVIDENCE THAT WOULD PROVE THAT HE WAS ACTUALLY SENTENCED IS SIMPLY MISSING FROM THE TRIAL RECORDS."

THEY WENT ON TO SAY: (SEE APPENDIX 21, LINE 10)

" WE AGREE WITH JUSTICE PRENTICE THE AUTHOR OF THE DISSENTING OPINION, WHO STATED:

' IT IS NOT THE OFFICE OF THIS COURT TO PATCH HOLES SOMETIMES LEFT BY INEXPERIENCED OR CARELESS COUNSEL. BY DOING SO, WE MAY BE SUPPLYING AN ESSENTIAL THREAD, WHICH, IN FACT, WAS NON-EXISTANT.' "

PETITIONER/RESPONDENT ASKS THIS COURT TO DETERMINE THAT THE DISSENTING INDIANA SUPREME COURT JUSTICES AND THE MAJORITY PANEL OF THE U.S. COURT OF APPEALS FOR THE 7TH CIRCUIT WERE CORRECT IN GRANTING THE WRIT OF HABEAS CORPUS UNLESS THE STATE ELECTS TO RETRY THE PETITIONER ON THE HABITUAL STATUS CHARGE.

RESPONDENT ASKS THIS COURT TO CONTINUE TO REQUIRE "PROOF BEYOND A REASONABLE DOUBT" BEFORE A PERSONS LIBERTY MAY BE TAKEN FROM HIM. TO DO OTHERWISE WOULD BE A TRAVESTY.

IN CONCLUSION, RESPONDENT ASKS THIS COURT TO READ PAGES 11 AND 12 OF THE STATES PETITION FOR REHEARING (APPENDIX 20 &23) AND PAGE 17 OF THE PETITION FOR WRIT OF CERTIORARI. THESE PETITIONS ON THEIR FACE , ASK THIS COURT TO CONVICT, "BY INFERENCE" ; WHEN THE PETITION STATES.... "JUDGE DUBBE STATED...(AT LEAST BY INFERENCE) ... THEREFORE, BY INFERENCE, WILLIAMS WAS SENTENCED ON THE 1975 CONVICTION... (ON PAGE 12)... THE TROUBLE (AT LEAST INFERENTIALLY) INCLUDED BOTH...".

THE STATE WOULD LIKE TO "INFER" GUILT. IF THIS COURT, OR ANY COURT WERE TO ACCEPT "INFERENCE" INSTEAD OF ACTUAL PROOF, THEN THERE WOULD BE NO REASON FOR A TRIAL... JUDGES COULD "INFER" FROM HIS CONDUCT THAT A PERSON WAS GUILTY. POLICE COULD "INFER" THAT A PERSON WAS GUILTY OF A CRIME. COURTS WOULD "INFER" THAT A PERSON WAS GUILTY AND OUR ENTIRE STRUCTURE OF JURISPRUDENCE WOULD BE FOR NAUGHT.

RESPONDENT, BERNARD WILLIAMS, ASKS THIS HONORABLE COURT TO DENY THE PETITION FOR WRIT OF CERTIORARY TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AS IT PRESENT NOTHING TO REVIEW;AS THERE IS NO QUESTION OF INTERPRETING INDIANA LAW, BUT IS SIMPLY A QUESTION WHETHER THE RECORD CONTAINS EVIDENCE THAT HE WAS TWICE SENTENCED. THAT QUESTION IS OUTSIDE OF THE GUIDELINES SET FORTH IN RULE 17 OF THIS COURT AND FOR THAT REASON THE PETITION SHOULD BE DENIED.

RESPECTFULLY SUBMITTED,

Bernard Williams

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APPENDIX

MEMORANDUM IN SUPPORT

The habitual offender statute, I.C. 35-50-2-8, in effect at the time was convicted reads in pertinent part as follows:

> 35-50-2-8. Habitual offenders.-- (a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two [2] prior unrelated felony convictions. A person who is found to be an habitual offender shall be imprisoned for an additional fixed term of thirty [30] years, to be added to the fixed term of imprisonment imposed under section 3, 4, 5, 6, or 7 [35-50-2-3 -- 35-50-2-7] of this chapter.
>
> (b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two [2] prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsecton, if:
>
> (1) It has been set aside; or
>
> (2) It is one for which the person has been pardoned.
>
> (c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under I.C. 35-4.1-1-4-3 [35-50-1A-3].
>
> (d) The jury (if the hearing is by jury), or the court (if the hearing is to the court alone), may find that the person is an habitual offender only if the state has proved beyond a reasonable doubt the the person had accumulated two [2] prior unrelated felony convictions.

Dec 28 3 24 PM '82
U.S. DISTRICT COURT
NORTHERN DISTRICT
OF INDIANA

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

BERNARD WILLIAMS, a/k/a
Anthony Sherrard,

Petitioner,

vs. CIVIL NO. S82-0266

JACK DUCKWORTH, Warden and
INDIANA ATTORNEY GENERAL,

Respondents.

MEMORANDUM AND ORDER

This case is presently before the Court on a petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254. The petitioner, Bernard Williams, is an inmate at the Indiana State Prison, Michigan City, Indiana, where he is currently serving a sentence of four years for theft and an additional thirty years for being an habitual offender. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, this memorandum of decision and order constitutes this Court's findings of fact and conclusions of law. The state record has been filed here and carefully examined.

Petitioner raises as his sole ground for relief the contention that Indiana law requires proof of both conviction and sentencing of two or more separate charges before one may be convicted as an habitual offender, but that the evidenced produced at his habitual offender hearing only proved sentencing on one of petitioner's two prior convictions.

Indiana's Habitual offender statute reads as follows:

> 35-50-2-8. Habitual offenders.-(a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two [2] prior unrelated felony convictions.
>
> (b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two [2] prior unrelated felony convictions. However, a conviction does not count, for purposes of this

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subsection, if:

(1) It has been set aside; or

(2) It is one for which the person has been pardoned.

(c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under IC35-4.1-4-3 [35-50-1A-4],

(d) A person is an habitual offender if the jury (if the hearing is by jury), or the court (if the hearing is to the court alone), finds that the state has proved beyond a reasonable doubt that the person had accumulated two [2] prior unrelated felony convictions.

(e) The court shall sentence a person found to be an habitual criminal to an additional fixed term of thirty [30] years imprisonment to be added to the term or imprisonment imposed under section 3, 4, 5, 6, or 7 [35-50-2-3 -- 35-50-2-7] of this chapter. If the court finds that ten [10] years or more have elapsed between the date the person was discharged from probation, imprisonment, or parole (whichever is later) for the last prior unrelated felony conviction and the date he committed the felony for which he is being sentenced as an habitual offender, then the court may subtract up to twenty-five [25] years from the additional fixed term of thirty [30] years.

(f) If a reduction of the additional thirty [30] year fixed term is authorized under subsection (e), the court may also consider the aggravating or mitigating circumstances in IC 35-4.1-4-7 [35-50-1A-7] to:

(1) Decided the issue of granting a reduction; or

(2) Determine the number of years, if any, to be subtracted, under subsection (e).

Ind. Cone §35-50-2-8 (Burns Ann. 1982).

Paragraph (d) of the above cited statute is the key: "A person is an habitual offender if the jury... finds that the state has proved beyond a reasonable doubt that the person had accumulated two prior unrelated felony convictions." After a lengthy hearing before the jury on petitioner's habitual offender charge, covering more than sixty pages of the record (pp. 223 to 283A), the jury found the petitioner to be an habitual offender (R.97). Judgment on the jury's verdict was entered accordingly. Id.

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It is not the role of the federal habeas court to reweigh the evidence produced in a state court proceeding; rather, where sufficiency of the evidence is concerned, the federal habeas court may grant relief only if it determines that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324 (1979). Further, in viewing the evidence addressed at the state criminal proceeding, the federal habeas court is to construe the state court record in a light favorable to the prosecutor. Id., at 319.

In addition to the above, the Supreme Court has held, in construing 28 U.S.C. §2254(d), that a determination of facts after a hearing on the merits by a state court, evidenced by a written opinion, is to be presumed correct absent proof by the petitioner that one of eight enumerated exceptions is present. Summer v. Mata, 449 U.S. 539 (1981); see also United States ex rel. Ross v. Franzen and Wolfe, 668 F.2d 933, 937 (7th Cir. 1982).

Further, the sufficiency question raised by petitioner deals with a construction of state law (Ind. Code §35-50-2-8). Since it is axiomatic that the highest court in a state is ordinarily the final arbiter of questions relating to the construction of that state's statutes, United States ex rel. Burnett v. People of the State of Illinois, 619 F.2d 668 (7th Cir. 1980), cert denied, 449 U.S. 860, this Court now turns to the language of the decision by the Indiana Supreme Court in petitioner's earlier state appeal:

> The sole issue presented for our review is whether the evidence presented at the habitual offeder hearing was sufficient to support the court's finding that appellant was an habitual offender.
>
> [1] That statute provides that enhanced sentences for those found to be habitual offenders, and habitual offenders are therein defined. Ind. Code §35-50-2-8 (Burns 1979) provides as follows:
>
> "(a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument,

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that the person has accumulated two (2) prior unrelated felony convictions,"

A conviction is excluded it if has been set aside or if it is one for which the offender has been pardoned. Ind. Code §35-50-2-8(b). Appellant contends that it was therefore incumbent upon the State to prove not only that he has accumulated the requisite convictions, but that he had not been pardoned. However, we view the exclusions mentioned as being affirmative defenses to the habitual criminal charge, and hold that the burden is upon the defendant to come forward with such a defense rather than on the state to prove the negative, that the appellant has not been pardoned.

[2] In addition, this precise issue was discussed at trial. It was explained by the court that prior convictions would not count with regard to §35-50-2-8 if in fact ther had been a pardon or if the judgment had been set aside. The Court stated:

> COURT: Well, the judgment set aside, the means the conviction is set aside. There is no issue of that in these cases. You are not going to present anything to the effect that any judgment has been set aside, ar you?
>
> MR. BEERBOWER: No, we do not intend to.

It is clear that in this case there was no offer of any proof or claim that any judgment had been set aside, or that appellant had been pardoned. There is no error on this issue.

Appellant also claims that the documents and thestimony were insuficient to prove the two prior felony convictions. He claims that the documents were incomplete insofar as they did not set out the penalty imposed.

Defendant had been convicted of forgery in 1971 and of theft in 1975. The State introduced into evidence certified copies of the order book entries in such cases, which showed findings upon guilty pleas. Lawyers who had represented the defendant in those prior proceedings testified that Williams, the appellant here, and the defendant in those proceedings, were one and the same person. The State also established by the testimony of one of the lawyers, that the Defendant had been sentenced on the forgery conviction. The appellant admitted that he had "served time." Appellant Willliams testified, "I was convicted of a forgery, yes." and "I do have a theft conviction." The state must, of course, prove that the defendant has been convicted, or has accumulated two prior unrelated felony convictions. There is sufficient evidence here that the previous convictions of this defendant were final judgments. There was no other evidence regarding the sentencing of the defendant, as the trial judge had determined that since sentencing was not a function of the jury, no mention was to

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be made of sentencing. See, Griffin v. State (1981), Ind., 415 N.E.2d 60; Debose v. State (1979), Ind., 389 N.E.2d 272. The trial court had ruled on a motion in limine that the jury not be allowed to be advised of penalties or sentences.

> [3] The motion in limine read in pertinent part as follows:
>
> "Wherefore, the State of Indiana respectfully requests the Court to instruct the Defendant and its counsel and witnesses not to mention, refer to, interrogate, concerning or attempt to convey to the Jury in any manner, either directly or indirectly, the penalty or possible sentence for this and related felonies without first obtaining permission of the Court outside the presence and hearing of the Jury..."

Record at 228.

This motion was granted and the defense attorney asked as follows:

> "Your Honor, would I be correct in stating then that we cannot make any reference to the sentencing that just has occurred, nor can the witnesses make any reference to the sentencing on any prior conviction for which he has been convicted of?

Record at 229. The court replied that that would be correct and that the issue was whether or not the defendant had the convictions, not the sentences. This ruling extended the restriction further than necessary, since the general rule relates here to not informing the jury as to the sentence to be imposed for being found to be an habitual criminal rather than to prevent the jury being informed of any previous sentences given on prior convictions. Griffin, supra, and cases cited therein, Debose, supra. However, it was not error in this case to have restricted the mention of any sentences.

> [4] Even though there was no direct evidence presented regarding the sentencing of the appellant on the theft conviction, ther was ample evidence presented that he had been convicted of forgery in 1971 and of theft in 1975, and that he had served time. Other witnesses, including the trial judge, testified that he had been convicted of the two felonies. Judge Busse testified that these causes had been completed and there was no claim that these were not final judgments. The evidence was sufficient to prove that appellant had accumulated two(2) prior unrelated felony convictions.
>
> Judgment affirmed.

Williams v. State, ___ Ind. ___, 424 N.E.2d 1017, 1018-19 (1981).

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Bearing all of the above carefully in mind, this Court now turns to a review of the evidence presented at the habitual offender hearing.

The record reveals that petitoner entered a plea of "guilty" to the charge of forgery in Allen Circuit Court on June 8, 1971 based on an earlier incident which occurred in a shopping mall in Glenbrook, Allen County, Indiana (R. 240-243). Sentencing on that guilty plea was set for July 6, 1971, and the petitioner was in fact sentenced (R. 245). On September 29, 1975, the petitoner was convicted of a second felony, theft, after entering a guilty plea in Allen Circuit Court (R.253). Sentencing was set for October 6, 1975 (R. 258). The testimony of the trial judge involved in the 1971 forgery conviction and the 1975 theft conviction was to the effect that those proceedings had been completed (R. 271-2). Further, the record reveals that the convictions for forgery and theft were unrelated, as required by Ind. Code §35-50-2-8(a)(R.247-8, 260, 273).

Petitioner's third conviction, based on an incident occurring on October 2, 1978 and which forms the basis of this action, is not related to the two prior convictions (R. 9). In light of petitioner's admissions to having been convicted twice earlier (R. 280-81), and his statement that "I have served time," (R. 276), coupled with the other evidence produced at the hearing and noted above, this Court declines to hold that the petitioner has overcome his burden of persuasion as set forth in Jackson v. Virginia and Summer v. Mata, supra.

Accordingly, no grounds existing justifying the issuance of a writ of habeas corpus, petition's application for a writ of habea corpus is DENIED. CASE DISMISSED.

William [illegible]
Chief Judge, United States District Co

Dated: 12/28/82

cc; B. Williams
D. Steiner

App

JUDGMENT ON DECISION BY THE COURT

United States District Court

FOR THE NORTHERN DISTRICT OF INDIANA

BERNARD WILLIAMS
a/k/a Anthony Sherrard
VS.
JACK DUCKWORTH, Warden
INDIANA ATTORNEY GENERAL

CIVIL ACTION DOCKET NO. S82-266

JUDGMENT

This action came on for ~~trial~~ (hearing) before the court, United States District Judge ~~(Magistrate)~~ ALLEN SHARP presiding. The issues having been duly ~~tried~~ (heard) and a decision having been duly rendered, it is ordered and adjudged .....

that Petitioner take nothing by his petition and this case is dismissed.

Dated at: SOUTH BEND, INDIANA

Date: DECEMBER 28, 1982

RICHARD E. TIMMONS
Clerk of the Court

BY Terrie M Hahle Deputy

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IN THE

SUPREME COURT OF INDIANA

BERNARD WILLIAMS, a/k/a ANTHONY SHERRARD	)	
Appellant (Defendant Below)	)	
v.	)	No. 880 S 360
STATE OF INDIANA	)	
Appellee (Plaintiff Below)	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Philip R. Thieme, Judge

PRENTICE, J. — Dissenting

While I agree that the burden of proving a pardon or that a conviction had been set aside, Ind. Code § 35-50-2-8 (b) (Burns 1979), rested with the defendant, I dissent from the remainder of the majority opinion.

Ind. Code § 35-50-2-8 (Burns 1979) provides for enhanced sentences for those found to be habitual offenders, and habitual offenders are therein defined in terms of prior convictions and sentences.[1]

> "It is clear from the statute that to sustain a sentence under it, the State must show that the defendant has been previously twice convicted and twice sentenced for felonies, that the commission of the second offense was subsequent to his having been sentenced upon the first and that the commission of the principal offense upon which the enhanced punishment is being sought was subsequent to his having been sentenced upon the second conviction." Miller v. State, (1981) Ind., 417 N.E. 2d 339, 342 (italics in original).

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In this case, the State undertook to prove that the defendant had been convicted and sentenced for forgery in 1971 and for theft in 1975. It introduced into evidence certified copies of the order book entries in such cases, which evidenced findings upon guilty pleas as to both prior offenses. Transcripts of the sentencings, however, were not introduced.

By the testimony of the lawyers who had represented the defendant in those prior proceedings, the State established that the defendant therein and Defendant (Appellant herein) were one and the same. The State also established, by the testimony of one of the lawyers, that Defendant had been sentenced upon the forgery conviction but did not present any evidence that he had been sentenced upon the theft conviction.

The trial court's order in limine was addressed to the defendant and did not restrict the State in presenting evidence of sentencing. The record, however, is devoid of evidence that Defendant had ever been sentenced upon the theft conviction. One could infer that he had been sentenced for some offense from his own admission that he had "served time." However, there is no disclosure with respect to the conviction under which it was served.

Under the statute the State must show a sentencing for each of the alleged prior convictions. The State, however, made no attempt to prove the sentencing circumstantially, for example by showing that the defendant "served time" for two alleged prior felonies and had not "served time" for any conviction other than those charged. For all that can be discerned from this record, Defendant may have served time for unrelated Misdemeanors. A reasonable trier of fact may not infer, beyond a reasonable doubt, Ind. Code § 35-50-2-8(d), that a defendant had been sentenced for a specifically alleged prior felony conviction from a naked admission that he had been in jail.

App/c

Copies of docket sheets were identified as exhibits and were commented upon by some of the witnesses. It is possible that they disclosed that the defendant had been sentenced upon the theft charge. However, they were never introduced into evidence and are not part of the record. Further, none of the testimony reveals what the docket sheets evidenced, other than that they did relate to the aforementioned forgery and theft convictions. That the judgments of conviction were identified as final, by Judge Busse, the judge who had presided at the guilty plea hearing, is of no consequence. He merely identified his signatures upon the docket sheets. He also acknowledged that he did not know whether the defendant was the same person who had suffered the convictions shown by such docket sheets. His testimony cannot be regarded as evidence against the defendant.

Upon this state of the record, the finding that the defendant was an habitual offender cannot stand. The finding results in the denial of Defendant's freedom. The quality of proof to sustain such finding is fixed by statute and is the same as that required to sustain a guilty verdict upon a crime charged, "beyond a reasonable doubt." The State simply failed to prove one of the required elements., My determination is not arrived at by weighing evidence or determining credibility. Rather, the record is devoid of any evidence from which it can be found, or reasonably inferred, that the defendant has ever been sentenced upon the prior theft conviction. It is not the office of this Court to patch the holes sometimes left by inexperienced or careless counsel. By doing so, we may be supplying an essential thread which, in fact, was nonexistent. The finding, therefore, is contrary to law and a denial of Defendant's constitutional rights to due process of law. The case should be remanded and the defendant re-sentenced.

DeBRULER, J., concurs.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 83-1158

BERNARD WILLIAMS, A/K/A ANTHONY SHERRARD,

Petitioner-Appellant,

v.

JACK R. DUCKWORTH, Warden,
and INDIANA ATTORNEY GENERAL,

Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. 82 C 0266—Allen Sharp, *Judge.*

SUBMITTED APRIL 19, 1984*—DECIDED JUNE 27, 1984

Before CUMMINGS, *Chief Judge*, PELL, *Circuit Judge*, and SWYGERT, *Senior Circuit Judge.*

SWYGERT, *Senior Circuit Judge.* Pro se petitioner, Bernard Williams, appeals the denial of his petition for

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Rule 34(a), Fed. R. App. P.; Circuit Rule 14(f). Petitioner has filed such a statement and requested oral argument. Upon consideration of that statement, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

EXHIBIT "B"

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a writ of habeas corpus. In his petition, Williams asserts that there was insufficient evidence to support a finding that he was an habitual offender. Ind. Code § 35-50-2-8. The district court rejected that contention. For the following reasons, we hold that there was insufficient evidence to support a finding beyond a reasonable doubt that Williams was an habitual offender. We reverse the district court and grant petitioner's request for habeas relief.

I.

Petitioner Williams was convicted by a jury of theft in the Superior Court of Allen County, Indiana, and in a separate proceeding he was found, by the same jury, to be an habitual offender pursuant to Ind. Code § 35-50-2-8.[1]

---

[1] The relevant portion of the statute in effect at the time of the hearing reads as follows:

35-50-2-8 Habitual offenders

Sec. 8. (a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions. A person who is found to be an habitual offender shall be imprisoned for an additional fixed term of thirty (30) years, to be added to the fixed term of imprisonment imposed under section 3, 4, 5, 6, or 7 of this chapter.

(b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two (2) prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsection, if:

(1) it has been set aside; or

(2) it is one for which the person has been pardoned.

(c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under IC 35-4.1-4.3.

(Footnote continued on following page)

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Williams was sentenced to four years imprisonment on the theft charge and to a consecutive term of thirty years as an habitual offender.

The petitioner appealed to the Indiana Supreme Court from his conviction as an habitual offender. His sole claim of error was that there was insufficient evidence to support the finding that he was an habitual offender. The Indiana Supreme Court affirmed the conviction by a divided court. *Williams v. State*, 424 N.E.2d 1017 (Ind. 1981).

Williams then filed a habeas petition in the federal district court, raising the same contention he had made in the Indiana Supreme Court. The district court dismissed the petition, finding no basis for habeas relief.

Because petitioner challenges the sufficiency of the evidence presented at the habitual offender proceeding, we will review the evidence presented at that proceeding in some detail.[2]

[1] *continued*

(d) The jury (if the hearing is by jury), or the court (if the hearing is to the court alone), may find that the person is an habitual offender only if the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions.

[2] The state suggests that, as a federal court, we should defer to the state appellate court's factual findings in the absence of any of the enumerated exceptions listed in 28 U.S.C. § 2254(d). *Sumner v. Mata*, 449 U.S. 539 (1981). The state has enunciated the general rule of deferral to state court factual findings. This general rule of deferral, under certain circumstances, may even be applied to sufficiency of the evidence claims, *see Davis v. Franzen*, 671 F.2d 1056 (7th Cir. 1982); *United States ex rel. Green v. Greer*, 667 F.2d 585 (7th Cir. 1981); although 28 U.S.C. § 2254(d)(8) provides that deferral to the state court factual findings is inappropriate where the findings are not fairly supported by the record. The record in the instant case does not fairly support the determination that Williams was sentenced on his second conviction. We do not agree with the state's assertion that Williams has not attacked the factual determinations of the Indiana court.

(Footnote continued on following page)

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The habitual offender proceeding[3] commenced with a *motion in limine* by the state to prevent the defense from mentioning the actual sentence the defendant would receive should he be found to be an habitual offender.[4] The court granted the state's motion and, upon a request for clarification, ruled that the motion also pertained to mentioning sentences that the petitioner received on any of his previous convictions.

The evidentiary hearing began with the state calling the attorney who represented petitioner on a 1971 forgery conviction. The attorney, testifying pursuant to a subpoena, stated that he had represented Williams in 1971 on a forgery charge. The attorney identified the defendant as the same person whom he represented in 1971, and testified that Williams had pleaded guilty to the forgery charge. The attorney testified that the petitioner was sentenced on the same charge. The state introduced a copy of the order accepting defendant's guilty plea. The order does not reflect the fact that petitioner was sentenced, but merely sets the date for the sentencing hearing. The attorney also testified that to the best of his knowledge the 1975 charge against defendant appeared to be unrelated to the 1971 forgery conviction.

The next witness called by the state, again testifying under subpoena, was the attorney who represented Williams on a 1975 theft charge. The attorney identified the defen-

[3] *continued*
Williams's claim, by its very nature, attacks the factual findings by asserting that there was no evidence presented to show that he was sentenced for the second felony conviction. This is a direct challenge to the state court's factual determination that there was sufficient evidence presented to prove that he was sentenced for the second felony conviction.

[3] The habitual offender statute provides for a bifurcated proceeding. The second proceeding is tried before the same jury trying the underlying offense. Ind. Code § 35-50-2-8(c).

[4] The statute does not provide for jury discretion in sentencing on an habitual offender count. The jury is charged only with the determination of whether the defendant is an habitual offender.

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dant as the same person whom he represented in 1975. The attorney testified that the petitioner pleaded guilty to the charge. Pursuant to the attorney's identification, the state introduced a document, similar to the one mentioned above, wherein the defendant's guilty plea was accepted. The document sets a sentencing date but gives no indication that sentencing actually occurred. Thereafter, the attorney testified, upon examination of documents relating to the 1971 and 1975 charges, that the charges appeared to be unrelated. The attorney testified that to the best of his knowledge, the guilty plea had neither been set aside, reversed on appeal, nor had a pardon been issued.

The next witness appearing on behalf of the state was Judge Herman Busse, the presiding judge at both petitioner's 1971 and 1975 convictions. The judge was shown docket sheets for both convictions, although the docket sheets were never introduced into evidence. The judge, after being shown the docket sheets, indicated that the petitioner entered a guilty plea in both the 1971 and 1975 proceedings. The judge testified that both were felony convictions. The judge indicated that he probably would not remember the defendant. He did testify that the docket sheets contained his handwriting and that the two convictions were unrelated. At no time was the judge questioned about whether the petitioner had actually been sentenced.

The petitioner testified on his own behalf at the hearing. His testimony attempted to show that his two prior convictions were related because they both stemmed from his addiction to heroin. Upon cross-examination the petitioner testified that he had been convicted of both the 1971 forgery charge and the 1975 theft charge. Williams testified that he had been in serious trouble and that he had "served some time."

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II.

A finding by a jury or judge that a person is an habitual offender is not a criminal conviction, it merely provides for the imposition of an enhanced sentence. The determination that a person is an habitual offender, however, is a factual question for a trier of fact, either a judge or a jury. The standard of proof for a finding that a person is an habitual offender, as enunciated in the statute, is proof beyond a reasonable doubt. Ind. Code § 35-50-2-8(d). *Twyman v. State*, 431 N.E.2d 778 (Ind. 1982).

One initial issue we must resolve is whether a challenge to an habitual offender determination is cognizable in a federal habeas petition. As a general rule, a federal court will not review state sentencing determinations that fall within statutory limits. *Solem v. Helm*, 103 S. Ct. 3001 (1983); *Rummel v. Estelle*, 445 U.S. 263 (1980). *Solem* and *Rummel* were Eighth Amendment cases challenging the severity of the sentences imposed. The instant case involves a due process claim: whether the state met its burden of proof in showing that the petitioner was an habitual offender. A sufficiency of the evidence challenge to a state court finding that a person is a recidivist is cognizable in a federal habeas proceeding. *French v. Estelle*, 692 F.2d 1021 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 2108 (1983). Likewise, the claim made here is cognizable in this habeas proceeding.

The standard for federal court review of sufficiency of the evidence claims is set out in *Jackson v. Virginia*, 443 U.S. 307 (1979). A court must determine whether, in viewing the record in the light most favorable to the prosecution, "no rational trier of fact could have found" the facts essential to an habitual offender determination beyond a reasonable doubt. *Id.* at 323. We apply the *Jackson v. Virginia* standard to this sentencing issue because the state requires that an habitual offender finding must be supported by proof beyond a reasonable doubt. *See French v. Estelle*, 692 F.2d at 1024 n.6. The Indiana Supreme Court applies a standard similar to the

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one enunciated in *Jackson v. Virginia* to its own review of the record in habitual offender proceedings. In *Twyman v. State*, 431 N.E.2d 778 (Ind. 1982), the Indiana Supreme Court stated that

> [i]n reviewing claims of insufficient evidence, this Court does not weigh the evidence or resolve questions of credibility, but only looks to the evidence and reasonable inferences therefrom which support the verdict. *Smith v. State*, (1970) 254 Ind. 401, 260 N.E. 2d 558. If from that viewpoint there is evidence of probative value from which a reasonable trier of fact could infer that a defendant was guilty beyond a reasonable doubt [of being an habitual offender], we will affirm the conviction. *Glover v. State*, (1970) 253 Ind. 536, 255 N.E.2d 657, *Taylor v. State*, (1973) 260 Ind. 64, 291 N.E.2d 890.

Twyman, 431 N.E.2d at 779. We therefore must decide whether, viewing the evidence in the light most favorable to the state, any rational trier of fact could have found beyond a reasonable doubt that the petitioner was an habitual offender.

III.

Prior to a review of the evidence, we must determine exactly what the state must demonstrate in order to prove beyond a reasonable doubt that a person is an habitual offender. The statute defines an habitual offender in section (b) as follows:

> After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two (2) prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsection if:
>
> (1) it has been set aside; or
>
> (2) it is one for which the person has been pardoned.

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Implicit in the description of a "prior unrelated felony conviction" for purposes of the habitual offender statute are both the conviction and the sentencing. The Indiana Supreme Court has interpreted the statute in that manner. In *Miller v. State*, 417 N.E.2d 339 (Ind. 1981), the Indiana Supreme Court held that:

> [i]t is clear from the statute that to sustain a sentence under it, the State must show that the defendant had been previously *twice convicted* and *twice sentenced* for felonies, . . . (emphasis in the original).

Id. at 342. In *Woods v. State*, 456 N.E.2d 417, 419 (Ind. 1983), the Indiana Supreme Court noted that "the burden of the state in proving the status of habitual criminal is met solely by proof of convictions and sentences. *Spivey v. State*, (1982) Ind., 436 N.E.2d 61."[5]

Under the previous habitual offender statute the state was required to make a showing that the person charged as an habitual offender "had been imprisoned upon the first sentencing prior to the commission of the second offense and that he had been imprisoned upon the second sentencing prior to the commission of the principal offense." *Miller v. State*, 417 N.E.2d at 342. The new statute dispensed with the requirement of imprisonment, thereby allowing a finding of being an habitual offender

[5] The Amended Information for Habitual Offender itself indicates that the state must demonstrate defendant was twice convicted and twice sentenced. The Information reads in pertinent part:

> . . . On or about the 8 day of June, A.D., 1971, at the County of Allen and in the State of Indiana, in the Circuit Court, one Anthony Sherrard a/k/a Bernard Williams was convicted of a felony, to wit: forgery, . . . and based upon said conviction, Anthony Sherrard a/k/a Bernard Williams was sentenced . . . .
>
> Further, on or about the 29th day of September, 1975, in the Circuit Court of Allen County, State of Indiana, one Anthony Sherrard a/k/a Bernard Williams was convicted of a felony, to wit: theft, . . . and based upon said conviction, Anthony Sherrard a/k/a Bernard Williams was sentenced . . . .

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for a person who, for example, received a suspended sentence. *See* Bobby J. Small, Commentary, Ind. Code § 35-50-2-8; *Spivey v. State*, 436 N.E.2d at 63. The requirement of sentencing was expressly retained. *Miller v. State*, 417 N.E.2d at 342. The state's own requirement for finding a person to be an habitual offender is that he was twice convicted and twice sentenced.[6] The question before us, then, is whether the state sustained its burden of showing that petitioner was sentenced on each of the two prior convictions.

Upon a review of the record, we conclude that no rational trier of fact could have found beyond a reasonable doubt that the petitioner was sentenced on the 1975 theft conviction. The evidence that would prove that he was actually sentenced is simply missing from the trial record. The docket sheets, although present at the hearing, were never introduced into evidence. We cannot speculate as to whether they contained information concerning sentencing. Judge Busse, the presiding judge at both prior convictions, did not testify that the petitioner was sentenced on the theft conviction and there is no indication that he ever testified that the proceeding was complete. Petitioner's own testimony that he had "served time," does not lead to the conclusion that he had "served time" on the theft conviction. As the dissent in the Indiana Supreme Court opinion notes, petitioner may have served time on unrelated offenses. The record does not indicate that he "served time" on the theft conviction. *Williams v. State*, 424 N.E.2d at 1020 (Prentice, J., dissenting).

[6] The statute does not allow the use of a conviction for an habitual offender charge if it has either been set aside or it is one for which the person has been pardoned. Ind. Code § 35-50-2-8(b)(1) and (2). These two exceptions have been construed to be affirmative defenses which must be pleaded and proved by the defendant. *Havens v. State*, 429 N.E.2d 618, 622 (Ind. 1981); *Williams v. State*, 424 N.E.2d at 1018. It is not incumbent upon the state to prove that the conviction has not been set aside or that the defendant has not been pardoned. The Indiana courts have not interpreted the statute to require that lack of sentencing be proved as an affirmative defense by the defendant. *See Williams v. State.*

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We note that proof of sentencing on the theft conviction was certainly within the grasp of the prosecutor. A sentence for the first prior conviction was demonstrated when the prosecutor asked petitioner's first attorney, who represented him on the forgery count, whether petitioner had been sentenced. The attorney responded in the affirmative and that testimony clearly supported a finding beyond a reasonable doubt that petitioner had been sentenced on that forgery conviction. That is not the case in respect to the theft charge. We agree with Justice Prentice, the author of the dissenting opinion, who stated that

> [i]t is not the office of this Court to patch holes sometimes left by inexperienced or careless counsel. By doing so, we may be supplying an essential thread which, in fact, was nonexistent.

Id. at 1021. This court should also not patch holes that could have been simply repaired by a properly placed question.[7]

The state argues that we must defer to the state court's interpretation of its own statute and, accordingly, affirm the denial of petitioner's habeas action. While we, of course, agree with the general proposition that a federal court must defer to a state court's interpretation of the state's statute, *United States ex rel. Burnett v. People of the State of Illinois*, 619 F.2d 668 (7th Cir.), *cert. denied*, 449 U.S. 880 (1980), the Indiana Supreme Court did not interpret the statute but found that the evidence was sufficient to support the jury's finding. The Indiana Supreme Court did not squarely address the issue of whether any evidence of sentencing was required; it mere-

[7] The Indiana Supreme Court now requires that proof of prior convictions be supported by record evidence. Parol evidence alone is insufficient to establish a prior conviction absent a showing that the proper records are unavailable. *Morgan v. State*, 440 N.E.2d 1087 (1982). Given available documents, proof of actual sentencing would have been easy to demonstrate without violating the *motion in limine* preventing any mention of the actual amount of the sentence received.

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ly states the evidence was sufficient. We are not bound by that determination. We find that the state failed to prove beyond a reasonable doubt that petitioner was twice convicted and twice sentenced. The finding that he was an habitual offender must therefore be set aside.[8]

IV.

For the foregoing reasons, we reverse the district court's denial of petitioner's petition for a writ of habeas corpus. Petitioner's request for habeas relief is granted unless the state elects to pursue the sentencing charge under the habitual offender statute further within 90 days.

PELL, *Circuit Judge*, dissenting.

Aside from any question of comity, although it would seem that this question should never just be brushed aside in a habeas case, the majority opinion on the facts of this case simply has found a meritorious case for habeas relief with which conclusion I cannot agree. I therefore respectfully dissent.

The majority opinion recognizes and agrees with the general proposition that a federal court must defer to a

[8] We make no determination as to whether the state may properly retry petitioner without implicating petitioner's Double Jeopardy rights. The Indiana Supreme Court has held that where a trial judge has made an improper legal ruling thereby precluding the state from proving its case, when otherwise it could have offered the proper evidence, retrial is appropriate without implicating the Double Jeopardy Clause. *Morgan v. State*, 440 N.E.2d 1087 (Ind. 1982) (the trial judge ruled parol evidence was sufficient to prove prior convictions and the prosecutor relied on the improper legal ruling). It is unclear whether Indiana would consider petitioner's case to be controlled by *Morgan*. We will not consider the issue. *See Burks v. United States*, 437 U.S. 1 (1978) wherein the Supreme Court considered the issue, which we do not decide today, of whether a reversal for insufficiency of the evidence barred retrial in light of the Double Jeopardy Clause of the Constitution. *See also Washington v. Duckworth*, 567 F. Supp. 513 (N.D. Ind. 1983).

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state court's interpretation of its own statute, however, holds here that the Indiana Supreme Court did not interpret the statute but merely found the evidence was sufficient to support the jury's findings. In saying that the evidence was sufficient to prove that Williams had accumulated two prior unrelated felony convictions on its review of that evidence, the Indiana Supreme Court may not have been directly interpreting its own statute but implicitly was doing so by saying that that statute as applied to the facts of the case before it had been sufficient to prove guilt beyond a reasonable doubt. It appears to me that the Supreme Court's analysis, contrary to that of the majority opinion which focused only on the lack of a direct showing of sentencing, placed the gist of the statutory offense on there being two convictions pursuant to the plain language of the Indiana statute.

The relevant portion of the statute in effect at the time of the trial read as follows:

> 35-50-2-8 Habitual offenders
>
> Sec. 8 (a) The state may seek to have a person sentenced as an habitual offender for any felony by alleging, on a page separate from the rest of the charging instrument, that the person has accumulated two (2) prior unrelated felony convictions. A person who is found to be an habitual offender shall be imprisoned for an additional fixed term of thirty (30) years, to be added to the fixed term of imprisonment imposed under section 3, 4, 5, 6, or 7 of this chapter.
>
> (b) After he has been convicted and sentenced for a felony committed after sentencing for a prior unrelated felony conviction, a person has accumulated two (2) prior unrelated felony convictions. However, a conviction does not count, for purposes of this subsection, if:
>
> (1) it has been set aside; or
>
> (2) it is one for which the person has been pardoned.

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> (c) If the person was convicted of the felony in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing, under IC 35-4.1-4.3.
>
> (d) The jury (if the hearing is by jury), or the court (if the hearing is to the court alone), may find that the person is an habitual offender only if the state has proved beyond a reasonable doubt that the person had accumulated two (2) prior unrelated felony convictions.

A careful reading of this statute reflects that eligibility for conviction of being an habitual offender comes about by being convicted of two prior unrelated felonies with the only proviso that neither conviction has been set aside or has resulted in a pardon. Indeed, the majority opinion concedes that the sentencing is only implied in the description of the prior unrelated felonies. The sentencing is only in the statute in the indirect sense of timing as to when the judgment of convictions have become final. Here, however, there was no question that the convictions in both cases were final judgments and that the causes had been completed. The trial judge so testified. *Williams v. State*, 424 N.E.2d 1017, 1019 (Ind. 1981). Even if we assume, however, that there must be some direct evidence of sentencing on both convictions, and there is no controversy about the first conviction in 1971, it appears to me that this court should not challenge the holding of the Indiana Supreme Court that there was sufficient evidence on the sentencing for the second conviction also. I turn to the record in that respect and in so doing I accept and adopt the standard as laid down, and as approved by the majority opinion in this case, *Twyman v. State*, 431 N.E.2d 778 (Ind. 1982), in which the Indiana Supreme Court stated that:

> [i]n reviewing claims of insufficient evidence, this Court does not weigh the evidence or resolve questions of credibility, but only looks to the evidence and

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> *reasonable inferences therefrom which support the verdict. Smith v. State*, (1970) 254 Ind. 401, 260 N.E.2d 558. If from that viewpoint there is evidence of probative value from which a reasonable trier of fact could infer that a defendant was guilty beyond a reasonable doubt [of being an habitual offender], we will affirm the conviction. *Glover v. State*, (1970) 253 Ind. 536, 255 N.E.2d 657, *Taylor v. State*, (1973) 260 Ind. 64, 291 N.E.2d 890.

Id. at 778 (emphasis added). I have quoted from *Twyman* as it appears in the majority opinion with the exception of the emphasis on reasonable inferences which the majority seems to ignore as existing in this case.

The majority opinion declines to give any significance to Williams' own statement that he had served time, although, of course, as the majority concedes, it is not important that he actually had served time only that he be given a sentence. Nevertheless, the fact that he served time is indicative of the fact that there was a sentence.

A careful reading of his testimony seems to me to provide full support for a reasonable inference that the serving of time to which he referred related to both prior convictions, being the ones here involved. Williams, at the very beginning of his direct testimony, after he gave his name and address testified as follows:

> Q. Is it true, Mr. Williams, that you have been in some trouble before?
>
> A. Yes, it is.
>
> Q. Do you remember exactly which case was which?
>
> A. No, not exactly.
>
> Q. Did—but you have been in some serious trouble before, is that correct?
>
> A. Yes, I have served time.
>
> Q. Is there anything specific to which you attribute the fact that you have been in serious trouble before?

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> A. Mainly heroin addiction, of which I have since been cured. But at the present times, yes. Both the *offenses* did happen while I was addicted. [Emphasis added.]

It seems to me that the jury correctly concluded, as did the Indiana Supreme Court, from this testimony that Williams himself was referring to "time" for "[b]oth the offenses."

Also, before the jury as an exhibit was the certified copy of court records relating to the 1975 conviction, the final lines of which read as follows:

> Said defendant had a prior pre-sentence investigation report, and now dispenses with such investigation herein at his request.
>
> Sentence is now set for October 6, 1975, at 1:30 P.M.

Sentencing was set for October 6, 1975 and as the Supreme Court pointed out the trial judge had "testified that these causes had been completed and there was no claim that these were not final judgments." 424 N.E.2d at 1019. I fail to see how there could have been a final judgment without sentencing.

These two instances by themselves provide the reasonable inferences to prove beyond a reasonable doubt that Williams indeed was sentenced for the 1975 conviction, which proof, in any event, related only to demonstrating for the timing purposes of the statute the finality of the judgment of the second conviction. The existence of the second conviction, of course, is undisputed.

No one really contends in this case that Williams was not sentenced in 1975 and apparently a direct question to that effect to his 1975 trial attorney, for some reason, was not asked. The prosecutor by asking the simple question would have obviated the problem presented by this case. Because the inferences, however, clearly supported what was undoubtedly the fact, this court has elevated form over substance in granting the writ of habeas corpus. The sentence for being an habitual offender, notwithstand-

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ing the various remedial provisions which are capable of substantially shortening periods of confinement, is a severe one, and there should not be sentencing as an habitual offender unless the crime is proven beyond a reasonable doubt. On the other hand, there is no question that Williams was convicted of three felonies within the span of a decade.

The legislative judgment as to the term of the sentence is not an issue before us. Our only concern is whether Williams was denied constitutional due process. The highest court of the state held that he was not convicted improperly under the statute. I agree with that decision.

A true Copy:

Teste:

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OAG-C.J.
JUL 02 1984

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-1158

BERNARD WILLIAMS, a/k/a, ANTHONY SHERRARD,	)	Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
Appellant (Petitioner Below),	)	
v.	)	
JACK R. DUCKWORTH, Warden, and INDIANA ATTORNEY GENERAL,	)	The Honorable Allen Sharp, District Judge
Appellees (Respondents Below).	)	

PETITION FOR REHEARING OF
RESPONDENTS-APPELLEES, SUGGESTION
FOR REHEARING IN BANC, AND APPENDIX

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plea on September 29, 1975 (R.252-253, 256-259, 265, 272). The theft resulting in the 1975 conviction had occurred in November, 1974 (R.266), and sentencing had been set at the time of the guilty plea for November 6, 1975 (R.256). Williams' act of theft, which resulted in his 1979 conviction, had occurred in October, 1978 (R.9), so that the evidence of record established that the 1971 forgery, 1975 theft, and 1979 theft convictions had been unrelated (R.246-248, 260, 273). As found by the Indiana Supreme Court, Judge Busse (a state trial judge) testified that the two previous criminal actions (1971 and 1975 charges) had been completed (at least by inference) and there was no claim by Williams that these were not final judgments. Williams v. State, supra, at 1019; see also, R.270-274. The record also indicated, again without contradiction, that the 1971 forgery and 1975 theft convictions had not been set aside (R.248, 261). Thus, there was certainly ample evidence to permit any rational or reasonable juror to find that Williams had been convicted of two prior unrelated felonies.

Moreover, the evidence did establish that Williams' 1975 theft conviction had been completed. Such fact was established by the Indiana Supreme Court in its opinion. See, Williams v. State, supra, at 1019. Therefore, by inference, Williams was sentenced on the 1975 theft conviction, as a matter of record, since sentencing after conviction is quite obviously an integral part of the completion of any criminal

proceeding in Indiana. Note, IC 35-4.1-4-2 (Burns, 1979), since repealed. In addition to the above-cited evidence, there are several additional evidentiary factors demonstrating that Williams was properly found to be an habitual offender. It is very significant that Williams admitted before the jury during the course of the habitual offender hearing that he had been previously convicted of forgery and theft, as set forth in Count II of the criminal information filed against him in 1979 (R.280-281). This testimony of Williams on cross-examination was tantamount to an admission that the allegations contained in Count II were correct. Count II, which was read to the jury, specifically alleged that Williams had been convicted and sentenced with respect to 1971 forgery and 1975 theft charges. Williams also admitted that he had served time because of the trouble he had been in as a result of his heroin habit (R.275-277). The trouble (at least inferentially) included both the forgery and 1975 theft convictions (R.277-278). In sum, there was evidence (at the very least indirectly) demonstrating that Williams had been sentenced for the 1975 theft conviction. Given all of the above evidence, the District Court was clearly correct in determining that a rational trier of fact could have found Williams to be an habitual offender under Indiana law, even if the panel majority properly interpreted the requirements of the Indiana law.